

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 In Re: METHYL TERTIARY BUTYL
4 ETHER ("MTBE") PRODUCTS
LIABILITY LITIGATION

00 CV 1898 (SAS)

Conference

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6 New York, N.Y.
7 April 16, 2014
5:15 p.m.

8 Before:

9 HON. SHIRA A. SCHEINDLIN

10 District Judge

11 APPEARANCES

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1 (Case called)

2 THE COURT: Is the only case on today the Orange
3 County audit history?

4 MR. AXLINE: Yes, your Honor.

5 THE COURT: Are you in that case, Mr. Cepeda?

6 MR. CEPEDA: No, your Honor. But by the time it was
7 confirmed, I was already on the plane, so I might as well show
8 up.

9 THE COURT: Is there a particular issue that we could
10 get out of the way?

11 MR. CEPEDA: No. I'm fine just listening in.

12 THE COURT: We are not going to do Puerto Rico today,
13 but thank you for coming.

14 The only issue I know about is the station matrix
15 problem, continuing problem with the station matrix. In
16 particular, Tesoro and Lyondell have both written saying there
17 is no evidence they know of against their clients to which
18 plaintiffs say commingled product.

19 I didn't realize, and neither did the defendants, that
20 plaintiffs are intending to rely on the commingled product
21 theory. I thought plaintiff has always said in this case that
22 it wasn't relying on an alternative theory of liability and
23 that it could do product identification, which is what the
24 station matrix was all about. So we do have a couple of
25 topics.

1 Let's put aside Lyondell and Tesoro initially and see
2 what else we have to talk about. For the rest of you who
3 aren't Lyondell or Tesoro, tell me what your problem is if you
4 are not with one of those companies.

5 MS. ROY: Whitney Roy, representing ExxonMobil
6 Corporation. We have been talking about a tentative
7 stipulation with plaintiff that would resolve a lot of the
8 issues that we were concerned about when we came to you last
9 time.

10 THE COURT: Right.

11 MS. ROY: There may be a deal breaker issue. The
12 proposal we received from the plaintiff is that for each of the
13 stations, the defendant that owned or operated or is basically
14 the obvious anchor tenant of that station would stipulate to
15 their dates that they were on the property. In return, for
16 other stations where they are just targeted based on some sort
17 of allegation of supply to the station, the plaintiff would
18 walk away from those claims and dismiss them.

19 If we were able to get through a stipulation that
20 works for everyone, that would resolve a lot of the issues we
21 were concerned about for summary judgment and would streamline
22 the motions substantially.

23 THE COURT: That would mean that the plaintiffs would
24 decide not to go after suppliers unless the supplier is the
25 same company as the owner of the station. But short of that,

1 they would agree not to go after suppliers.

2 MS. ROY: There are some instance where the anchor
3 tenant is only there because they are a supplier but they are
4 the majority supplier or they are a much bigger share and
5 direct supplier to the station.

6 The deal breaker point, though, is that the defendants
7 would want the dismissal of those other stations or claims on
8 other stations to be with prejudice. As you can imagine, that
9 would be something we want. Plaintiff is wrestling with that
10 issue.

11 We have not gotten firm confirmation from them of
12 that. We are sending of them a draft of a stipulation by
13 Friday. If we can reach a resolution on prejudice, the motions
14 will be streamlined and we will have accomplished some. If the
15 with-prejudice agreement doesn't come through, then the
16 stipulation is going to be thrown out the door and we will have
17 to submit motions that are substantial. That's where we stand
18 on that issue.

19 There are three independent stations.

20 THE COURT: Why don't we pause there for a moment.
21 Mr. Axline, is your client leaning toward agreeing to with-
22 prejudice dismissal or have you rejected it out of hand and
23 there is no point until waiting until Friday?

24 MR. AXLINE: No, we haven't rejected it out of hand,
25 your Honor. Our objective here is to allow the defendants to

1 present their motions in the most efficient way possible given
2 your prior rulings. But we also have to preserve our record in
3 that process. I'll tell you, frankly, my concern with the
4 with-prejudice point is that if we can come up with language
5 that would preserve our ability to pursue the claims should
6 there be a reversal on appeal of the reasons that we are
7 stipulating, I think we are going to be able to get there.
8 That is our objective.

9 THE COURT: I'm not quite sure I understand that to be
10 with prejudice. What you are saying is you would agree to
11 dismiss with prejudice but reserve the right that if there was
12 an appeal of my ruling and it was reversed, that could vacate
13 the stipulation, essentially?

14 MR. AXLINE: Yes, in substance.

15 THE COURT: Are defendants going to be interested in
16 that idea?

17 MS. ROY: Your Honor, the problem is that the rulings
18 that we are talking about are rulings from the City of Fresno
19 case.

20 THE COURT: That's OK. He is still saying that's only
21 a matter of lawyer drafting. He is saying should the
22 underlying ruling that created the thought that it should be
23 with prejudice and -- what other parts of the ruling would you
24 be referring to, Mr. Axline?

25 MR. AXLINE: That's it.

1 THE COURT: That's it. There are a lot of things that
2 can happen on the way. The case could settle, it may never get
3 appealed, you may not win the appeal. A lot of things could
4 happen. But he is saying in the event that he actually pursues
5 an appeal way down the road and is successful, that would
6 vacate the stipulation.

7 MS. ROY: I understand.

8 THE COURT: The chances of all the steps happening may
9 be somewhat slim.

10 MS. ROY: One of the proposals I made was that perhaps
11 if they could identify specific opinions that they are wanting
12 to reserve and if we can get to language that everyone is
13 comfortable with, then we will have a stipulation. We are just
14 not there yet. We need a couple more days.

15 THE COURT: So it is possible that the outlines of
16 what he just said could be acceptable?

17 MS. ROY: It all comes down to language, once we see
18 in it writing.

19 THE COURT: It is also concept. The concept is to
20 preserve the plaintiff's right to appeal that ruling. Yes, he
21 would identify the ruling, and yes, you would have to work out
22 the language. But the concept is fairly simple to me. You
23 will dismiss with prejudice but subject to the right to appeal
24 a ruling in a different case. It is California. Should it be
25 reversed, that would vacate the stipulation of dismissal with

1 prejudice.

2 MS. ROY: Understood. That is a plausible agreement.
3 I can't speak for all the defendants on this point. It was
4 something that we just discussed out in the hallway.

5 THE COURT: I see. Mr. Axline, can you identify the
6 opinion that you are talking about, opinion or opinions?

7 MR. AXLINE: Yes.

8 THE COURT: Now?

9 MR. AXLINE: Yes. There were rulings in the Fresno
10 case on commingled product. There was a ruling on the statute
11 of limitations in the Orange County Water District case, an
12 earlier ruling in the Orange County Water District case that
13 the defendants are invoking and which we don't want to have
14 this Court have to visit again on additional stations. Those
15 are the rulings that we are talking about.

16 THE COURT: You could be more specific by date and
17 docket number at another time.

18 MR. AXLINE: Yes. I think that would go into the
19 stipulation. I think that Ms. Roy's proposal makes sense. I
20 just heard it in the hallway.

21 THE COURT: That was her proposal about preserving the
22 right to appeal? No.

23 MR. AXLINE: It was her proposal to specify the
24 rulings.

25 THE COURT: All right.

1 MS. ROY: It is obviously something we will need to
2 discuss with our clients once we see the exact orders, but that
3 helps.

4 THE COURT: Given that it is still in negotiations, I
5 realize you have all come here, but does it make sense to spend
6 any more time on the defendants other than Lyondell and Tesoro,
7 since you may be on the verge of an agreement?

8 MS. ROY: Yes, your Honor, there is a remaining issue.
9 The stipulation does not address all of the stations. There
10 are three independent stations and two Thrifty stations where
11 they would not be subject to the stipulation. We have been
12 asking, as we have told you before, for plaintiff to provide us
13 with the evidence they are relying on to get our gas to those
14 stations. We have still not received it.

15 THE COURT: Mr. Axline, that is not right. The whole
16 idea was to do it before everybody traveled here today. What
17 evidence do you have AT those three independent stations and
18 two Thrifty stations that, for example, the Exxon gas was
19 there? What do you have? What theory is that? Are you
20 talking about an alternative theory? Are you talking about a
21 supplier situation? What are you talking about?

22 MR. AXLINE: We are talking about an alternative
23 theory at those stations, your Honor, the commingled products,
24 as we informed the defendants at the first session.

25 THE COURT: I'm sorry, I missed that.

1 MR. AXLINE: As we informed the defendants at the
2 meeting, the first session.

3 THE COURT: What was the meeting first session?

4 MR. AXLINE: On April 8th.

5 THE COURT: It wasn't until April 8, 2014, that you
6 first raised commingled product in this case?

7 MR. AXLINE: No, your Honor.

8 THE COURT: This is an '04 case. It sounds like it's
9 ten years old. Go ahead.

10 MR. AXLINE: Unlike the Fresno case, the defendants
11 didn't submit contention interrogatories to the district in
12 this case. The meet-and-confer session was the first
13 opportunity to discuss with the defendants the evidence upon
14 which we were going to base our claims with respect to
15 commingled product. It was the first time we had discussed
16 their summary judgment motions. It is not like they asked us
17 are you going to invoke the commingled product theory and we
18 said no. They did not do that.

19 THE COURT: And you never represented you weren't
20 going to use it?

21 MR. AXLINE: It never came up specifically.

22 THE COURT: I'm asking you. You never made a
23 representation that you weren't going to use it in this case?

24 MR. AXLINE: No, we did not.

25 THE COURT: Ms. Roy, your question seems to be

1 answered that with respect to the three independent stations
2 and the two Thrifty stations, the theory is not one of product
3 tracing, the theory is one of commingled product. As long as
4 there is going to be some evidence that your material was in a
5 refinery or was commingled with other product which eventually
6 made its way to the station even though one can't identify
7 everybody's product within the combined product, that's the
8 theory.

9 MS. ROY: Your Honor, this is actually a different
10 story from the one that we received last Wednesday during our
11 meet-and-confer, particularly with respect to the three
12 independent stations and the Thrifty. I'm at a loss for what
13 to tell you. They seem to be constantly moving around.

14 I would also like to correct the record. We did ask a
15 lot of interrogatories, as you can imagine, specifically.

16 THE COURT: Mr. Correll has a specific one to read.

17 MR. CORRELL: Interrogatory number 5 to the second set
18 of interrogatories states clearly "whether you invoke or rely
19 on any theory of alternative liability in the alternative to
20 the theory of traditional causation reflected in," and it gives
21 the cite's statute, "including without limitation theories of
22 market share liability or commingled product liability."

23 THE COURT: The answer?

24 MR. CORRELL: They objected. They said it was
25 contrary to rule 33(a)(2).

1 MR. AXLINE: This was a very early interrogatory.

2 THE COURT: I realize it is. It is probably contrary
3 to our local rule.

4 MR. CORRELL: The answers were May 14, 2010. That's
5 six years after the case was filed.

6 THE COURT: True. I'm saying it probably does violate
7 our local rule, but nobody came to me and moved to compel an
8 answer. Or, if you had an objection and they didn't answer
9 you, you should have come in and said they are objecting under
10 this rule as an improper interrogatory, will you overrule the
11 objection and compel them to answer.

12 So they never denied, they just objected. It seems to
13 me that under our rule, which is very limited on
14 interrogatories, it was probably an appropriate objection.
15 Unless you had asked me to overrule it, and then I would have
16 said while it is an appropriate objection in this case, it
17 would be wise to know, you have to answer. But that never
18 happened.

19 Given that you had an objection, not a denial, I don't
20 think I can say that Mr. Axline misled you. All he did was
21 object to your question. He didn't deny that he was going to
22 use it.

23 MR. CORRELL: He just told the Court that the reason
24 for the first time he disclosed was on April 8th was that we
25 had never asked.

1 THE COURT: That was a mistake. You asked, they
2 objected. They did ask. There is no point going over that.
3 He objected, he didn't deny, so there is no contradiction. I
4 still say once you got that objection, you should have come to
5 me.

6 MS. DOYLE: On behalf of Tesoro, to clarify, your
7 Honor, if anything, we were misled. There are a number of
8 occasions where it is obvious that they were not pursuing the
9 commingled product theory. We cite in the footnote in our
10 letter to you there is a 2006 letter where Tracy O'Reilly for
11 the plaintiffs' counsel is saying that basically we have done
12 this before in the South Tahoe case and we can do it again, we
13 can trace gas. That's one thing.

14 THE COURT: I don't know if it is helpful now to tell
15 me, basically. If you want to quote something she said from a
16 letter, quote it. You are accusing her of misleading you,
17 therefore the Court. I would have to hear the exact words.

18 MS. DOYLE: This is in a footnote to our letter. I'll
19 read it to you. It is to Special Master Warner. There is a
20 question about operator information and jobber information that
21 the parties are trying to obtain for purposes, frankly, of
22 product tracing.

23 She says, "First, the majority of the defendants in
24 the district's case owned and operated refineries that supplied
25 gasoline to the district service area over a long period of

1 time. South Tahoe's counsel, defense counsel in this matter,
2 was able to connect every refiner defendant to each and every
3 gasoline station in addition." That's 2006.

4 In 2010 --

5 THE COURT: Wait. I didn't hear any misleading there.

6 MS. DOYLE: She is responding to Special Master
7 Warner's question about how they were going to do it in terms
8 of the jobber, how they were going to basically connect the
9 dots of the refiners and other defendants to the stations.

10 THE COURT: Maybe I'm too generous, but the way I hear
11 that is we were able to do it in another case, so the inference
12 is we'll do our best to do it here. I didn't hear misleading.
13 I guess they are saying where they can do it, they are going to
14 do it.

15 MS. DOYLE: Your Honor, the next point is, from Mr.
16 Axline to us, to Tesoro, in a June 24, 2010 letter, he says
17 that it was a letter to Tesoro in which plaintiff identifies
18 the largest distributors and the relevant geographic area, and
19 at a telephonic conference before the special master after the
20 close of fact discovery, the Special Master Warner asked,
21 "Except, you know, the relief requested that an order
22 compelling all CWV to confirm the identities of the jobbers to
23 whom they issued subpoenas. So that's not difficult, right?
24 You can do that. Mr. Axline says, we can do that."

25 That was specifically again because they wanted

1 information from jobbers that we use to tie us to the stations

2 THE COURT: Again, that makes sense. If you can do
3 it, make every effort possible to do it. The only fallback on
4 the alternative theory is when you can't do it. He said, we
5 will try to do that, there were subpoenas out. I understand he
6 wanted to pursue it.

7 It's an easier case. If you can get the direct proof,
8 obviously it is an easier case to try and less risky from a
9 legal perspective. But I don't hear a denial yet that would
10 say at the end of the day when they weren't able to do it, that
11 they are precluded from being able to apply the commingled
12 theory.

13 MS. DOYLE: Your Honor, I don't know if we want to get
14 into this part of the argument at this point in time without
15 the Tesoro and commingled product theory --

16 THE COURT: I guess so.

17 MS. DOYLE: For them to raise commingled product
18 theory essentially at the eleventh hour is I think is a
19 disgrace. You know why I think it is a disgrace? For several
20 months prior to the close of fact discovery, plaintiffs'
21 counsel noticed 40-plus deposition notices for owners and
22 operators of stations at issue on the matrix, 34 stations. Not
23 only that, they also had in excess I believe of 80 jobbers that
24 were identified by all the defendants sitting in this room, and
25 they never, ever pursued those jobbers on any of this stuff.

1 The information was there, it's that they just did not pursue
2 it in discovery.

3 It is to me a different thing. They are obligated to
4 do their job. When the evidence is out there, they can't fall
5 back on --

6 THE COURT: You're saying it's not that they couldn't
7 do it, they didn't try.

8 MS. DOYLE: Correct, your Honor.

9 THE COURT: They didn't complete the effort to
10 identify directly, instead just fell back on the alternative
11 theory without completing the effort.

12 MS. DOYLE: Correct, your Honor.

13 THE COURT: The theory is supposed to be available
14 only when you can't identify. You're saying we don't know if
15 they could or they couldn't, because they didn't finish the
16 process, they just stopped.

17 MS. DOYLE: Correct, your Honor. For us, Tesoro, they
18 have never connected the dots. This was exactly the same
19 situation Tesoro was in in the City of Fresno case. They have
20 never ever been able to show us the evidence that links Tesoro
21 gasoline to any of the 34 stations.

22 We are in a position, your Honor, when the time is
23 set, that we will file motions for summary judgment as to all
24 34 stations. That is the position that we are put in and
25 that's what we will do. It is unfortunate. We had hoped that

1 we would be able to narrow the number of stations, but we have
2 not been able to.

3 THE COURT: Is Lyondell in the same position?

4 MR DiCHELLO: Your Honor, we are also in the same
5 position as Ms. Doyle indicated. Plaintiff essentially started
6 the process of trying to trace with respect to Lyondell and
7 just never finished it. We would likely move on all sites as
8 well.

9 MS. DOYLE: Your Honor, the last point I will make
10 about the commingled, based on your ruling in Fresno and some
11 other cases, if there is a defendant or defendants associated
12 with a station, if you have an anchor defendant like we were
13 just talking about in terms of like the stipulation, if you
14 have an anchor defendant or two or three, they should not be
15 able to pursue a commingled product theory.

16 THE COURT: I don't know if that's right. Just
17 because there are some defendants as to which you have direct
18 evidence that it was their product on the premises doesn't mean
19 that there weren't suppliers and the suppliers had a commingled
20 product and everybody who was part of that commingled product
21 has a share of the liability.

22 It is going back too many years, but I remember when
23 this whole commingled product started, you can also exculpate
24 yourself. There is a burden shifting built in, if I recall my
25 own theory from years ago. After they are allowed to use it,

1 the defendant can offer proof that they could not have been
2 part of any commingled product at that location if they can
3 show why.

4 MS. DOYLE: Correct. Your Honor, I think that based
5 on your Fresno ruling, plaintiffs still have to get it to the
6 station. They still have to get the gas to the station before.

7 THE COURT: As a commingled product. In other words,
8 they are starting with a refinery or --

9 MS. DOYLE: A terminal.

10 THE COURT: That's the word, "terminal." They are
11 saying at that terminal they can trace Tesoro material or
12 Lyondell material. Then it is mixed in a batch, put on a
13 truck, delivered to the station.

14 MS. DOYLE: They are going to have to connect those
15 dots. To date they haven't connected those dots. If that is
16 the approach, they have to connect those dots, and they can't
17 connect those dots.

18 THE COURT: Mr. Axline.

19 MR. AXLINE: Your Honor, you will recall that the
20 Orange County Water District case is, unlike the Fresno case, a
21 plume case.

22 THE COURT: OCWD is a plume case.

23 MR. AXLINE: Yes, unlike Fresno. Fresno is simply a
24 station case. The districts interested in the groundwater are
25 significantly more responsive, I think, than the City of

1 Fresno's. The southern California system for delivery of
2 gasoline is much more complex than was involved in the City of
3 Fresno. In that sense it is much more akin to Suffolk County.
4 We believe Suffolk County was also a plume case.

5 We did make extensive efforts to conduct discovery
6 against jobbers or other methods of connecting terminals
7 directly to stations.

8 THE COURT: Ms. Doyle just told me how you quit, had
9 40 subpoenas out or deposition notices or 80 of them, either 40
10 in one category, 80 of another, and then just didn't pursue
11 them.

12 MR. AXLINE: We pursued a number of subpoenas. In
13 fact, we got some records from subpoenas for the largest.

14 THE COURT: What you did do is not of interest. She
15 is pointing out what you didn't do. I forget. You used the
16 number 40 and 80.

17 MS. DOYLE: 40 owner/operator deposition notices, at
18 least 40, and then at least 80 jobbers.

19 THE COURT: That is the group she said you didn't
20 pursue, the 40 owner/operator, 80 jobbers, you had notices out
21 and didn't pursue them. There is no point in telling me what
22 you did do. That's what you didn't do.

23 MR. AXLINE: I think what we did do is relevant in
24 this sense. The law does not permit you to do a useless act.
25 By the time Orange County Water District came up, the retention

1 of records by jobbers as compared to what the situation was in
2 Tahoe was significantly less.

3 The jobbers that we spent the time to pursue who were
4 the most obvious targets, had no records. There was no reason
5 for them to keep those records. The question of whether we
6 should have continued to pursue that in light of what we had
7 already learned I think is a legitimate question as to the
8 question of impossibility.

9 In addition to the question of impossibility, we have
10 asked these defendants repeatedly for those kinds of records,
11 and they have, without saying -- well, it's a mixed bag, so I
12 hate to generalize. If you will take it as a generalization,
13 they haven't responded or they have said we don't have them.

14 I think we are going to be able to show impossibility.
15 We are going to be able to show much higher volume of product
16 by the commingled product defendants being sold into the
17 relevant geographic area, which makes it similar to Suffolk
18 County. It was sold into the relevant geographic area for a
19 much longer period of time, more like Suffolk County again than
20 Fresno.

21 THE COURT: What about that last argument that one of
22 the lawyers made, I don't remember which of the three, that if
23 you have an anchor defendant who is primarily liable or one or
24 two others at the station, that should be it? Was that you,
25 Ms. Doyle, who said that?

1 MS. DOYLE: Yes, your Honor. I was actually citing
2 from the City of Fresno decision, your Honor' decision.

3 MR. AXLINE: I have two responses. One is that at
4 some of the stations we have an anchor defendant for a period
5 of time, but for another period of time when released occurred
6 we do not have an anchor defendant.

7 THE COURT: Let's stop with when you do. Is Ms. Doyle
8 right? Apparently, she is quoting from a decision of mine in
9 City of Fresno. If you do have an anchor defendant at a
10 particular station theoretically for the whole period of time
11 or at some station for a period of time, in that instance do
12 you not have the opportunity to try to go after suppliers on an
13 alternative theory of commingled product? To you agree with
14 her at least to that extent?

15 MR. AXLINE: At a number of those stations those
16 anchor defendants purchased copious amounts of either MTBE or
17 MTBE gasoline from the commingled product defendants. What we
18 are being asked to do is to voluntarily dismiss as to these
19 defendants. We are not willing to do that.

20 THE COURT: You don't agree with her that even when
21 you do have an anchor defendant, so the hypothetical would be
22 you have one or more at a particular station for the entire
23 period of time, even there you would go after those who
24 supplied the commingled product?

25 MR. AXLINE: Even there we are not willing to dismiss

1 the claims against the suppliers.

2 THE COURT: Ms. Doyle disagrees with you even on the
3 proposition that if he can't identify the anchor defendant or
4 defendants, he still thinks he can pursue the suppliers. I
5 don't know what you are quoting from. I have written so many
6 opinions over so many years. It may be getting close to, who
7 knows, a hundred. I don't know which decision in the City of
8 Fresno you are referring to or what quote from it.

9 MS. DOYLE: Your Honor, this was on the causation
10 motion.

11 THE COURT: That won't help me. If you have it in
12 front of you.

13 MS. DOYLE: I have the cite.

14 THE COURT: Do you have a date?

15 MS. DOYLE: I'm sorry, your Honor, I do not have the
16 date of the Fresno decision. I apologize.

17 THE COURT: That's OK. What was the quote?

18 MS. DOYLE: It says, "The commingled product theory is
19 a theory of liability that, quote, shifts the burden of proof
20 to the defendant only in circumstances where, quote, each
21 defendant acted purposely but which of the defendants caused
22 injury is uncertain. In other words, it applies only when the
23 plaintiff can, quote, establish the other elements of a prima
24 facie case against a number of defendants, unquote, that
25 cannot, quote, identify the exact defendant who caused the

1 injury."

2 THE COURT: I don't see any inconsistency between Mr.
3 Axline's position and that quote.

4 MS. DOYLE: As I understood what you were saying, your
5 Honor, you have a defendant at the station already.

6 THE COURT: Not at all. That's not what it says.
7 Your interpretation seems erroneous to me, I must say.

8 MS. DOYLE: You can still have burden shifting even
9 though you have defendants --

10 THE COURT: There are different roles. There are
11 suppliers, there are owners. There are different roles in
12 this. We have been down this road for years. Every situation
13 has a combination of roles.

14 MS. DOYLE: You can have multiple alternative theories
15 of liability.

16 THE COURT: There can be more than one tortfeasor,
17 obviously, at any location.

18 MS. DOYLE: I understand.

19 THE COURT: What he is saying is he is not willing to
20 walk away from suppliers, which is sort of where we started.

21 MR. CORRELL: Your Honor, there is one other issue.
22 In these interrogatories also ask in interrogatory number 3 for
23 each defendant that you claim caused damage to any plume, give
24 us the facts. They gave us the tracing facts: For Chevron,
25 you branded this station, you supplied this station. But any

1 fact upon which Mr. Axline now contends that the commingled
2 product should be used, i.e., you just delivered this terminal
3 and it got put on this jobber's truck that went wherever, those
4 aren't disclosed.

5 We are now at the summary judgment stage and we are
6 really shadow boxing. For example, for Chevron he alleges that
7 we are liable at the Thrifty station. We have no records of
8 our gasoline going to Thrifty. I don't understand the facts
9 which I need to write a letter, the pre-motion letter.

10 THE COURT: I think we have had the pre-motion just
11 now. I think what he is saying is he can't specifically move
12 the Chevron product to the station or he wouldn't need the
13 alternative theory. What he is saying is there is a geographic
14 location, there is a terminal, the terminal supplies that
15 entire geographic area, and your product is in the terminal and
16 it's mixed and it's sent out and that's the best he can do.
17 That's what the theory is.

18 I agree that you make a very good point, sort of the
19 better point I have heard, about interrogatory number 3. When
20 was he supposed to tell you that?

21 MR. CORRELL: He should have told me the terminal he
22 is talking about. There are several terminals.

23 THE COURT: I understand that argument. It is a good
24 argument.

25 MR. CORRELL: You also have exculpation. They haven't

1 pled the commingled product theory. They objected to the
2 interrogatory, and they didn't put these facts in response. I
3 don't have an expert like I have used in other cases to
4 exculpate myself, because we learned about theory in a meet-
5 and-confer a week ago.

6 MR. ANDERSON: Jon Anderson for Conoco Phillips.
7 There is another aspect of this, and that is this revised
8 matrix that added a lot of stations to various defendants based
9 on what we now hear as a commingled theory happened in March of
10 2013. I've written at least five or six letters to Mr.
11 Axline's firm asking for the factual basis.

12 THE COURT: Yes.

13 MR. ANDERSON: They have never breathed a word about
14 commingled product.

15 THE COURT: When you wrote the five or six letters,
16 how did they respond?

17 MR. ANDERSON: They didn't respond to most of them.
18 Some they said we will respond soon, and we didn't get a
19 response until last week. No substantive response until last
20 week. That's when we first heard about commingled product.
21 Maybe this will get resolved with the stipulation.

22 THE COURT: I don't know, but that sounds like a good
23 argument, too. When you argue, Mr. Anderson, when you argue,
24 Mr. Correll, I expect to see it in your opposition briefs if it
25 has to go that way.

1 Those are good arguments, Mr. Axline. I know your
2 firm is very busy, maybe overwhelmed, but you can't come up
3 with these ideas at the last minute when people did ask you
4 specific questions about the facts. The first time you
5 mentioned this commingled thing is a week ago. That is
6 troubling.

7 You didn't plead it. They didn't take the discovery
8 that might exculpate. You haven't laid out the information as
9 to your proof with respect to the geographic areas that you are
10 now telling me about for the first time. So there is a lot of
11 last-minute stuff happening ten years later.

12 MR. AXLINE: We just have a disagreement about the
13 level of detail that we did provide in response to those
14 interrogatories, your Honor. We will point to the responses if
15 it comes to that.

16 THE COURT: There is no dispute. They are in black
17 and white. Whatever the responses are are in black and white.

18 MR. AXLINE: Yes.

19 THE COURT: They are filed documents. That is going
20 to be the easiest part of the briefing. You responded what you
21 responded and not more. If somebody sends you five letters in
22 the course of one year and you never give them the information
23 they ask for for a year, I don't think that looks too good for
24 raising this a week ago at a meet-and-confer.

25 I think it would be wasting time to have another pre-

1 motion conference with letters. I think it's got to be briefed
2 if it can't be worked out and that's the end of it. I have to
3 study this record. It's a big decision in the OCWD case, which
4 of course has to end, at least from here, and go back to
5 California.

6 MR. AXLINE: Your Honor, the plaintiffs would be OK
7 with that. I don't know how the defendants feel about it. As
8 the schedule is currently established there is a very shortened
9 schedule that was been established.

10 THE COURT: I'll skip it. I think I have heard what
11 it is to hear.

12 MS. PARKER: Amy Parker on behalf of the Valero
13 defendants. We are currently without information from the
14 plaintiffs to know which camp we fall in.

15 THE COURT: Which camp you fall in?

16 MS. PARKER: We participated in the April 8th in-
17 person meet-and-confer. We issued a letter to the plaintiffs
18 on March 28th.

19 THE COURT: Maybe we can pause and find out, Mr.
20 Axline, where does Valero stand?

21 MR. AXLINE: It has a leg in both camps, your Honor.
22 At some stations we have direct evidence of supply.

23 THE COURT: Have you put that in the matrix? Does she
24 know which stations have direct evidence for Valero?

25 MR. AXLINE: We owe her a letter as to which stations

1 are which.

2 THE COURT: For the remainder you want to rely on the
3 commingled product?

4 MR. AXLINE: Yes.

5 THE COURT: He answered your question. He owes you a
6 letter. When will you have the letter? By Monday?

7 MR. AXLINE: By Monday.

8 MS. PARKER: It is still unclear to us whether the
9 stipulation that is being offered to the other defendants is
10 being offered as to our clients.

11 THE COURT: I don't know that. You will have to work
12 that out. But he is going to give you a letter that identifies
13 which stations have direct evidence, and the rest he is relying
14 on the alternative theory. As for the stipulation, I can't get
15 involved with that. You are working directly with Mr. Axline
16 on that. He is going to have to make some decisions promptly.

17 Now the motions. To put all these defendants to
18 needless motion practice and the Court to needless motion
19 practice would not be a good thing when it sounds like the
20 stipulation being discussed might resolve the scope of the
21 motions and in some instances the moving defendant entirely.
22 How much longer is the negotiation on the proposed stipulation
23 going to last?

24 MS. ROY: Your Honor, the real issue is the prejudice
25 part of it. We will send them our language by Friday. They

1 should be able to make a decision on that fairly quickly.

2 THE COURT: You know what he wants, preserving the
3 right to appeal. He has to identify for you the exact
4 opinions. He did by substance today, not by date and docket
5 number, but he can. He will send you that right away. I think
6 you had better take until Monday so he can send you the case
7 law.

8 He can send not the case law but the cases that he
9 wants to preserve the right to appeal. You can send him your
10 proposed language Monday. He needs to look at it for a couple
11 of days. I would say if there is not a stipulation by April
12 25th, a week from Friday, then you know what you have to do on
13 the motion practice, period.

14 That's it, Mr. Axline. You either stipulate or you
15 don't, enough to limit the motion practice and in some
16 instances eliminate it. Some defendants may not be here for
17 the stipulation, others might be.

18 Starting with April 25th, when are the defendants
19 prepared to make their motions? And I don't want to get ten
20 motions or eight motions. I'm very careful about briefing to
21 make sure people cooperate on the legal issues.

22 If you are going to all say it's too late to invoke
23 the alternative liability theory of commingled product, we had
24 no discovery, we asked for interrogatories, that is one brief.
25 I am looking at coordinating counsel now, looking at Mr.

1 Riccardulli and Mr. Pardo for that. That has to be
2 coordinated.

3 When you have fact-specific motions, OK, I can take
4 some fact specific ones. But I won't have ten people making
5 the same argument about why they should be commingled. You are
6 going to have to meet as a group and figure out who is making
7 the generic motion. Do you understand, Mr. Pardo?

8 MR.PARDO: Understood, your Honor.

9 THE COURT: Good. There has to be a group meeting,
10 figure that out, one brief on common issues, then short,
11 targeted briefs on defendant-specific issues. But don't repeat
12 the legal argument over and over.

13 For goodness' sake, don't tell me the summary judgment
14 standard in the Second Circuit. Don't waste your pages on
15 that. If you feel you must, you can do it once in the general
16 brief, but don't waste pages on that. Get to the heart of the
17 specifics of what you want to say.

18 MS. ROY: Understood, your Honor. We will absolutely
19 coordinate.

20 THE COURT: Let's talk about a schedule.

21 MS. ROY: I'm sorry to interrupt. I just have one
22 thing that may affect you in terms of scheduling. We focused
23 here on really sort of the causation nuisance issues. There
24 are other intended issues to be raised on summary judgment that
25 we have not had your procedure of letter briefing beforehand.

1 THE COURT: Such as?

2 MS. ROY: There is likely going to be a motion on the
3 OCWD Act and one with respect to lack of damages at certain
4 stations. There are also, depending on how --

5 THE COURT: I don't take motions by issue. It's got
6 to all be combined in one brief. Again, those would be
7 general. The scope of the OCWD Act damages on the legal side
8 of it, one big long brief. Case-specific, if there are
9 specific facts, and I don't know why there would be on the OCWD
10 Act. It's a matter of law what it covers or doesn't cover. As
11 far as no damages, maybe that is specific per station. What
12 else?

13 MS. ROY: I understand that, your Honor. My only
14 point to you was just that we haven't engaged in your letter
15 briefing on this issue.

16 THE COURT: I know.

17 MS. ROY: We are fine going straight to the motion, if
18 that's what you refer.

19 THE COURT: I don't usually, but we have been down
20 this road so often. In this MDL I don't know that the delay is
21 worth it. But I do want to coordinate the briefing. That I
22 feel most strongly about. If I get flooded with ten 25-page
23 briefs, I will reject them all and start over again; it will be
24 a total waste of time. I'm not reading 250 pages.

25 The common issues, even including the ones you just

1 raised, like the scope of OCWDA, has to be one common brief.
2 It is all part of the same 25 pages as the other issue as to
3 why there can't be commingled product theory. We have to have
4 page limits. We don't make separate motions on issues. It is
5 called point 1 and point 2 and point 3 in the same brief, all
6 one motion.

7 That said, let's talk about when the briefs can come
8 in. Don't start counting until April 25th in the hope of
9 narrowing the issues by stipulation. Starting then, can
10 defendants make all motions by May 23rd, which is four weeks?
11 That gives time for coordination. Then we will talk again
12 specifically about page limits.

13 MS. DOYLE: Your Honor, I am concerned about the time
14 line a bit. In our situation we are going to have to be move
15 on 34 stations. We have prepared, the group has, and is
16 working jointly on the joint motion, the practice that you want
17 us to do, but we still have a lot of additional work to do
18 because only recently did we learn that we need to go to expand
19 to all 34 stations.

20 THE COURT: I don't understand expand. What does that
21 mean, expand to 34 stations? You're not filing 34 briefs. I
22 don't even know what you are talking about. He owes you a
23 letter, he said so already, or the lady next to you. Fine.
24 Where he has direct evidence at specific stations, you will
25 know it. He says he will update the final matrix on that.

1 Everything else is the alternative theory. There is
2 nothing specific about it. It's a matter of the terminals and
3 the transportation system, and he's got the burden of proof
4 initially and then it would switch to you to exculpate. You
5 can say there is no proof. Basically, your work is going to be
6 on the reply brief, as far as I can tell on that.

7 But let's go back to my schedule. I do think you
8 should be able to move by May 23rd. As you said, you have been
9 prepping up already. That's a ways off.

10 Then the response, Mr. Axline? I realize you are
11 responding to a number of different briefs. That is
12 significant. If you get the briefs May 23rd, I would give you
13 until July 7th because you are going to be responding to a lot
14 of material.

15 MR. AXLINE: Thank you.

16 THE COURT: Then reply briefs would be July 28th. It
17 is going to be a long schedule, but hopefully you will resolve
18 all the open issues.

19 With respect to these briefs, the joint brief will be
20 the usual 25-25-10 on common legal issues. With respect to
21 defendant-specific issues, I'd like to limit that to 15-15-7.
22 You have to be specific with specific facts about your station.
23 There are many of you. I'm going to get flooded as it is.

24 I don't see any point in having another conference.
25 Is there anything more that we should be discussing? I have

1 set a lengthy schedule so you have time to respond to
2 everybody. But the more work you can do up front to limit
3 these motions, Mr. Axline, the better off we will all be.

4 MR. AXLINE: Yes, your Honor.

5 MS. ROY: Your Honor, may I ask for one thing?
6 Because there are so many issues, would it be possible to
7 extend the number of pages for exhibits so we can give you
8 enough evidence?

9 THE COURT: Yes, that is possible. To what? I have
10 already allowed 225 pages. Everybody points that out to me.
11 They always say, you said five affidavits with X number of
12 pages. Everybody then aggregates and says, well, it's a total
13 of 225 pages, do you care how it is distributed. I have been
14 getting that for years. It is a lot of pages. You have to
15 think about this on the receiving end.

16 MS. ROY: I understand that, your Honor. It's just
17 with 34 stations it is a challenge.

18 THE COURT: It is not individual evidence. That is
19 your entire point. It may be that at some stations there is
20 direct evidence. The remainder is this theory. There isn't
21 direct evidence to rebut. I don't think you are fighting 34
22 individual cases on summary judgment.

23 The answer to that is there will be fact issues to be
24 tried. If it was here is his evidence and here is my
25 evidence -- this is not a trial on paper. This is for legal

1 issues. It is for undisputed facts. Lawyers have a very poor
2 understanding of the summary judgment process, in my opinion.
3 It is not hard. If you are dumping that much paper, I'm going
4 to say there must be an issue of fact, they put in 500 pages
5 each. It's crazy. It's not called a trial on paper. That is
6 not what summary judgment is. Please remember what it is.

7 There is a strong legal issue here, as you know, on
8 whether he can fall back on this alternative theory at all,
9 whether there is an anchor defendant, are others liable, etc.
10 That's fine. When I said there might be specific station
11 issues, it may be that although he says he has evidence that
12 I'm there, he hasn't shown any, there's none. That's when he
13 is not using the alternative theory but claims he has evidence.
14 You show it as none, fine. If you're going to start disputing
15 facts, I'm not trying cases on paper. That's not my job.

16 MR. CONDRON: Two quick questions. There are a couple
17 of issues that are a little bit discreet. Ms. Weirick's client
18 and mine have a specific issue with respect to res judicata
19 based on an earlier suit brought against us by the Orange
20 County distributor to your Honor.

21 THE COURT: Can you combine?

22 MR. CONDRON: Yes, absolutely, we will do that.

23 THE COURT: That one can be a separate 15-15-7.

24 MR. CONDRON: Thank you, your Honor.

25 THE COURT: The other quick question, since it's 6

1 o'clock?

2 MR. CONDRON: Yes. Not all of the issues necessarily
3 are based on this type of causation. We have one at a
4 particular station where the plaintiffs' expert basically
5 said -- you may recall the Anthony Brown issue in the New
6 Jersey case where he said I need to do more investigation
7 because I can't find anything I need to do right now, I don't
8 see any threat that this poses to a water well and I don't see
9 any threat or I can't identify any specific threat.

10 THE COURT: It sounds like this is no case.

11 MR. CONDRON: Exactly.

12 THE COURT: Talk to Mr. Axline. If you can't, that is
13 amenable to a motion. It shouldn't have to be made. If there
14 is no evidence, there is no evidence. If that's what the
15 expert said, it is laughable, he doesn't have a case right now
16 at that station.

17 MR. CONDRON: Thank you, your Honor.

18 THE COURT: Thank you.

19 MS. ROY: Your Honor, I'm sorry, one issue. Just a
20 housekeeping matter. We had a May 1st hearing on calendar in
21 this matter.

22 THE COURT: To do the pre-motions in this very
23 instance? I just said no. Thank you. I'll take it off May
24 1st.

25 (Adjourned)